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May 1, 1985

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Open Records Decision No. 429

Re: Whether Texas Turnpike
Authority must make available
under the Open Records Act
information regarding municipal
right-of-way dedications

Dear Mr. Steele:

As attorney for the Texas Turnpike Authority, your law firm received a request under the Open Records Act, article 6252-17a, V.T.C.S., for certain records in the custody of the authority. The information sought is relevant to right-of-way dedications along the Dallas North Tollway extension through the cities of Dallas, Addison, and Farmers Branch. See generally V.T.C.S. art. 6674v (statute creating Texas Turnpike Authority). It was requested by an attorney who described the documents as follows:

For each of the following topics:

a. The enactment of Ordinance No. 851 by the city of Farmers Branch on or about July 20, 1970;

[b.- g. The enactment of other specific ordinances by Farmers Branch, Dallas, and Addison],

h. The enactment or proposed enactment by any municipality of any other ordinance or regulation governing or affecting land use, or imposing setback requirements or other building restrictions adjacent to the 'Dallas North Expressway,' Dallas Parkway, or proposed Dallas North Tollway extension;

i. Any policy of the city of Farmers Branch, the city of Dallas, or the town of Addison concerning dedication of right-of-way for the Dallas North Tollway extension as a precondition to plat approval; and

j. Any other measures described or intended to reduce right-of-way acquisition costs for the Dallas North Tollway extension.

Please produce the following documents:

1. All correspondence or other documents passing between the Texas Turnpike Authority, or any agency, official, employee, or representative thereof, and the city of Farmers Branch, the city of Dallas, or the town of Addison, or any agency, official, employee, or representative of any of those entities, concerning or relating to any of the foregoing topics;

2. All minutes of meetings, or records of telephone conversations, between or among any agency, official, employee, or representative of the Texas Turnpike Authority and any agency, official, employee, or representative of the city of Farmers Branch, the city of Dallas, or the town of Addison, in which any conversation took place concerning or relating to any of the foregoing topics; and

3. All documents (including drafts of ordinances or regulations) prepared by the Texas Turnpike Authority, or any agency, official, employee or representative thereof, concerning or relating to any of the foregoing topics.

The documents you have submitted are organized into two groups identified as Appendix I and Appendix II. Appendix I consists of documents generated by your law firm as attorney for the Texas Turnpike Authority. They include communications to employees of the authority, an attorney's memo to the file, and letters to city officers of Dallas and Farmers Branch. Appendix II consists of correspondence between the authority and the governmental officers of Farmers Branch, Addison, and Dallas on the subject of right-of-way dedication. It also includes some internal memoranda of the authority and internal memoranda of the city of Dallas.

You claim that most, if not all, of this information is excepted by section 3(a)(3) of the Open Records Act as

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party . . . that the attorney general or the respective attorneys of the various

political subdivisions has determined should be withheld from public inspection.

V.T.C.S. art. 6252-17a. Section 3(a)(3) applies only when litigation on a specific matter is pending or reasonably anticipated and only to information clearly relevant to the pending litigation. Open Records Decision Nos. 323 (1982), 139 (1976). You inform us that the authority is currently bringing a condemnation suit against a client of the attorney requesting the documents. The authority is also involved in numerous other eminent domain proceedings with various owners of land abutting the proposed project. See generally V.T.C.S. art. 6674v, §8 (authority's eminent domain power). This is the pending litigation to which you claim the documents are relevant, with the exception of item I-5.

You state that the central issue in each condemnation case is the value of the right-of-way being acquired. It is well established in Texas law that this is the central issue in condemnation proceedings. See State v. Meyer, 403 S.W.2d 366 (Tex. 1966). You describe the relevance of this material to the lawsuits as follows:

The effect of the subject ordinances and the municipalities' policies concerning these ordinances are clearly relevant factors entering into the value of the right-of-way being acquired. . . . Without doubt, the opinions, notes, observations, and advice regarding the central issue of pending litigation is privileged information. . . .

The document submitted and ordinances discussed relate primarily to the authority's efforts to secure right-of-way by dedication. They do not address the value of such property. You do not show that these documents are relevant to the value of property that was not dedicated but had to be acquired by condemnation litigation. Nor are we able to determine their relevance by inspecting the documents. In Open Records Decision No. 222 (1979) this office stated that section 3(a)(3) does not apply where there is no showing of a direct relationship between the information sought and the pending or contemplated litigation. The documents you submitted are not sufficiently related to the condemnation suits to be excepted from public disclosure by section 3(a)(3).

Item I-5 is a letter from your law firm to the attorney of a city through which the extension will go. It discusses threats of a citizens' lawsuit against the city, not the Texas Turnpike Authority. Since this is not litigation to which the authority is a party, you may not raise section 3(a)(3) on behalf of the authority with respect to item I-5. The letter shows on its face that the city was not a client of the law firm; therefore the attorney-client privilege does not apply to it. See Open Records Decision No. 200 (1978). Thus, it

is not excepted from public disclosure by the attorney-client privilege as incorporated into section 3(a)(1) of the Open Records Act or by section 3(a)(3).

You raise other exceptions relevant to some of the material. You state that the documents in Appendix I are confidential and privileged as attorney work product or attorney-client communications and therefore protected from public disclosure by section 3(a)(1) of the Open Records Act. See Open Records Decision No. 200 (1978). The attorney-client privilege protects confidential communications from the client to the attorney and the attorney to the client. Id. It applies to legal opinions rendered by an attorney to a client, but not to factual reports, even though prepared by an attorney for a client. Open Records Decision Nos. 230 (1979), 210 (1978); see also Open Records Decision Nos. 412 (1984); 380 (1983).

The Rules of Civil Procedure protect from discovery an attorney's work product. Tex. R. Civ. Proc. 166b.3(a). The work product rule applies to material prepared by an attorney in anticipation of litigation. Black's Law Dictionary 1439 (5th ed. 1979); see Hickman v. Taylor, 329 U.S. 495, 510 (1947), United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), cert. denied, -- U.S. --, 104 S.Ct. 1927 (1984); Tex. R. Civ. Proc. 167; Open Records Decision No. 200 (1978). Open Records Decision No. 200 used the work product concept to determine the scope of section 3(a)(3) in the context of a claim under the employee's "special right of access" under section 3(a)(2). But see Open Records Decision No. 288 (1981) (an employee had no special right of access to information protected by section 3(a)(3)). The work product doctrine thus merely represents one aspect of section 3(a)(3) information relating to litigation. We have determined that none of the requested information has been shown to be "information relating to litigation" within section 3(a)(3); therefore, none of it is protected as material prepared by an attorney in anticipation of litigation.

Appendix I includes memoranda from your firm to employees of the Texas Turnpike Authority. Most of this material consists of factual reports by attorneys, although some legal opinion is also expressed. The authority is entitled to claim the attorney-client privilege only for the legal opinion in this material. We have marked the portions of Appendix I which may be withheld under the attorney-client privilege. The rest of Appendix I is available under the Open Records Act.

The documents in Appendix II consist of letters from the authority to the governing bodies of various municipalities, answers to some of the letters, and inter-office memoranda of the authority. You state that these documents are excepted from public disclosure by sections 3(a)(6) and 3(a)(11) of the Texas Open Records Act. Section 3(a)(6) excepts from disclosure

drafts and working papers involved in the preparation of proposed legislation;

The letters written by employees of the Texas Turnpike Authority request action by the cities that would require enactment of a city ordinance and suggest the terms of such ordinances.

Open Records Decision No. 248 (1980) determined that drafts of a municipal ordinance and resolution prepared by a city staff group were protected from disclosure by section 3(a)(6). The city staff group would ultimately present its final drafts to the city council. Section 3(a)(6) as construed in Open Records Decision No. 248 involves the internal deliberative processes of a governmental body relevant to the enactment of legislation. The governmental interests and the kind of documents it protects resemble those protected by section 3(a)(11). Like section 3(a)(11), section 3(a)(6) has been construed to be inapplicable to information basically factual in nature. Open Records Decision Nos. 344 (1982); 248 (1980); 197 (1978); 140 (1976). Section 3(a)(6) is made specifically relevant to the legislative process, but we believe it is sufficiently similar to section 3(a)(11) that prior decisions interpreting section 3(a)(11) may be helpful in determining the scope of section 3(a)(6).

Section 3(a)(11) applies to memoranda advising an agency prepared by someone within the agency or by an outside "consultant" who has some duty to advise the agency or act on its behalf in an official capacity. Attorney General Opinion JM-36 (1983); Open Records Decision Nos. 335 (1982); 298, 283, 273 (1981). We believe that section 3(a)(6) applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. Cf. Open Records Decision No. 367 (1983) (§3(a)(6) applies to recommendations on amending Public Accountancy Act prepared by Texas State Board of Public Accountancy). It does not, in our opinion, apply to materials prepared by another person or agency who has no official responsibility to do so but only acts as an interested party who wishes to influence the legislative process. Cf. Open Records Decision No. 283 (1981) (applicant's references and former employers are not within section 3(a)(11) because they do not act in an official capacity on behalf of a governmental body). In our opinion, documents concerning the Texas Turnpike Authority's efforts to persuade the various cities to enact particular ordinances are not excepted from public disclosure by section 3(a)(6).

Section 3(a)(11) protects from disclosure

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency;

This exception was designed to protect from disclosure

advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.

Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.). See also Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 419 (1984); 128 (1976). Factual information, where severable from advice, opinion, and recommendation, must be disclosed. Environmental Protection Agency v. Mink, *supra*; Attorney General Opinion H-436; Open Records Decision No. 419. The restrictions of section 3(a)(11) also apply to advice, opinions, and recommendations by consultants as well as employees of the governmental body. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Attorney General Opinion JM-36 (1983); Open Records Decision Nos. 335 (1982); 192 (1978). The term "consultants" includes "persons who are authorized to act, and do in fact act, in an official capacity on behalf of a governmental body." Attorney General Opinion JM-36 (1983); Open Records Decision Nos. 283, 273 (1981). Open Records Decision No. 283 considered whether section 3(a)(11) applied to the responses of an applicant's references and former employers to a questionnaire sent out by the Dallas Park Police. This office determined that the applicant's references and former employers were not within the inter-agency memorandum exception because those persons were not authorized to act and did not in fact act in any official capacity on behalf of the Dallas Police Department. To except from disclosure such communications would not encourage "open and frank discussion between subordinate and chief concerning administrative action." Environmental Protection Agency v. Mink, *supra*, at 87.

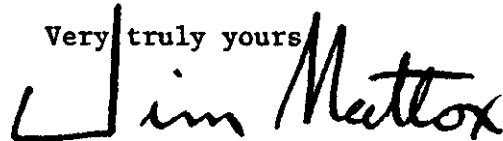
The letters to city governments found in Exhibit II express the position the authority has decided to take toward these cities, not the process of internal deliberations leading up to that decision. The authority is not acting as a consultant to the cities. It has no duty to advise the cities on the legislation they need. The cities did not request information or advice from the Texas Turnpike Authority; instead, the authority initiated the correspondence on behalf of its own interests. In our opinion, the correspondence between the authority and the cities found in Exhibit II is not protected from public disclosure by section 3(a)(11) of the Open Records Act.

Documents number II-17, II-18, II-19, II-20 and II-21 are inter-office memoranda of the Texas Turnpike Authority. Although they are the kind of internal documents described by section 3(a)(11) of the Texas Open Records Act, they are primarily factual and descriptive. They include little of the advice, opinion, and recommendation which

section 3(a)(11) is designed to protect. We have marked the portions of these documents which may be withheld under section 3(a)(11). The remainder must be disclosed to the public.

Exhibit II includes some communications from two of the cities in question. We have studied these documents and have determined that they are not protected by section 3(a)(6) or section 3(a)(11). Document II-15 is an internal memorandum of one of the cities; however, the Texas Turnpike Authority has not indicated that it is authorized to raise section 3(a)(11) for this city, nor is such authority apparent on the face of this document. The correspondence from the cities to the authority is available to the public under the Open Records Act. The entire file of documents, except for the portions we have marked, is therefore available to the public.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly stylized font. The first letter "J" is large and loops around the "i". The "M" is also large and has a distinct shape. The "a" is small and loops under the "t". The "t" is tall and has a small loop at the top. The "o" is a simple circle. The "x" is formed by two intersecting lines.

J I M M A T T O X

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